86-131

No. _____

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1986

ELIZABETH THORNTON,

Petitioner,

v.

ROBERT WAHL, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the Court of Appeals erred in employing on its own initiative Fed. R. Civ. P. 11 to impose the sanctions of attorneys' fees against a non-prevailing Plaintiff-Appellant in a civil rights suit in a case where fees were sought below pursuant to 42 U.S.C. 1988 and denied and where the Defendants did not appeal the denial and where the Court of Appeals did not inform the Petitioner that it was considering imposing sanctions against her and did not give her the right to be heard concerning the imposition of fees.

PARTIES

The parties in this case are the Plaintiff-Appellant in the United States Court of Appeals and the Petitioner herein, Elizabeth Thornton, and the Defendants-Appellees in the United States Court of Appeals for the Seventh Circuit and the Respondents herein, Robert Wahl, the Sheriff of LaSalle County, Illinois, Robert Newell, a Deputy Sheriff of LaSalle County, Illinois, Anthony Condi, a Deputy Sheriff of LaSalle County, Illinois, Robert Scutt, a Deputy Sheriff of LaSalle County, Illinois and Edmund Thornton, the former husband of the Petitioner.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is not yet published and is attached as Appendix 1. The Memorandum Opinion of the Trial Court is not published and is attached as Appendix 2.

———o———

JURISDICTION

The Judgement of the United States Court of Appeals for the Seventh Circuit was entered on April 3, 1985. A Petition for Rehearing *In Banc* was timely filed and was denied on April 28, 1986. (Appendix 4) Jurisdiction to review the Opinion and Judgement of the United States Court of Appeals was conferred upon this Court by 28 USC 1254(1).

———o———

STATEMENT OF THE CASE

For purposes of this Petition the most salient facts are those which occurred toward the end of the litigation. However, since the sanctions were ordered because, according to the Opinion below, the litigation was "Mrs. Thornton's revenge," and since the obvious inferences are that the litigation was frivolous, a brief history of the facts which spawned the litigation is in order.

While the MEMORANDUM AND ORDER of the Trial Court is not all inclusive, it is an accurate and fair statement of these facts. The events leading up to the filing of the civil rights law suit are summarized here from

that opinion, unless otherwise noted, and contained more fully in that opinion. (Appendix 2) The Petitioner, her husband and four children lived at the family estate (Thornwood) for approximately 16 years prior to acrimonious divorce proceedings. Thornwood was determined to be Mr. Thornton's non-marital property by the Circuit Court of Cook County, which decision was affirmed by the Appellate Court in 1980. On November 10, 1983, the Circuit Court of Cook County ordered Mrs. Thornton, the Petitioner herein, to vacate Thornwood on or before December 1, 1983.

Her lawyer in the divorce proceedings—who was not her lawyer in the Federal Court proceedings—filed a Notice of Appeal with the State Appellate Court on November 29, 1983 and on the 30th of November, he filed an application for a stay of the November 10, 1983 Order. Mr. Thornton, a Respondent herein, filed a response on December 1, 1983.

On that same day, Mr. Thornton's attorney sent a letter to Respondent Wahl, the Sheriff of LaSalle County, Illinois. In that letter, he advised Wahl of the November 10, 1983 Judgement and he enlisted Wahl's aid in the event that the Plaintiff did not comply with the Circuit Court's Judgement. Thornton and his lawyer also met with Wahl on December 1, 1983 at which time Thornton advised the Sheriff that he would seek to oust the Plaintiff from Thornwood on December 7, 1983 if she had not vacated the premises by that time.

By that date, the Appellate Court had taken no action on the Plaintiff's Motions and at approximately 8:15 a.m. on the morning of December 7, 1983, Respondent Thornton and the three Respondent deputy sheriffs appeared at

Thornwood. Acting on the advice of her lawyer who was communicating between Sheriff Wahl and the clerk of court (R. Item 16, App. B), the Plaintiff refused to admit Thornton and the deputies. After two hours, a locksmith picked the lock of the door. Upon gaining entrance, Thornton demanded that Mrs. Thornton leave, which she refused to do. At that time, Mrs. Thornton phoned her lawyer who in turn contacted Sheriff Wahl and unsuccessfully argued that the eviction of the Plaintiff was improper and should be halted.

After Thornton had been in the house for 15 minutes and after Mrs. Thornton had locked herself into her bedroom briefly, Mrs. Thornton agreed to vacate Thornwood on the condition that she be able to take a large box of personal papers or belongings with her. It was at this point she was arrested for criminal trespass pursuant to *Ill. Rev. Stat.*, Ch. 38. Sec. 21-3, handcuffed and jailed for two and one-half hours before being released on bond. Presumably because of the local prominence of the parties, Plaintiff's arrest attracted some media attention. The criminal trespass charge was later dropped.

Later, the Plaintiff filed a civil rights action in the United States Court for the Northern District of Illinois, using a different lawyer, who is her lawyer herein. As summarized in the Argument section of her Brief in the Seventh Circuit, the Plaintiff's civil rights argument was:

> "The Plaintiff's rights to privacy and to be free from bodily restraint and punishment were violated by the actions of Defendants who, without seeking a Rule to Show Cause in the Trial Court or an eviction order in the LaSalle County Courts and, while a Motion to Stay was pending, evicted and arrested the Plaintiff." (Argument section of Petitioner's Brief in the Seventh Circuit, Appendix 3, page 14)

The Defendants did not answer the Complaint as amended but instead filed Motions for Summary Judgement and for attorneys' fees in the Trial Court. Thornton's Motion for fees under 42 USC, Section 1988 alleged "this suit under Section 1983 is an abuse of that statute and was brought by Plaintiff in bad faith to harass and punish the Defendants." (R. Item 11, Section 8) The Sheriff and his three deputies, in support of their Motion for fees, charged the Plaintiff, "motivated by vindictiveness and the desire to punish the law enforcement officers of LaSalle County who caused her proper and lawful eviction," filed the suit "to harass and abuse" them and in "bad faith." (R. Item 10, Sections 4, 5)

No depositions were taken and each Defendant filed an affidavit, none of which touched upon the Plaintiff's alleged bad faith or alleged intent to harass and punish the Defendants. The Plaintiff submitted an affidavit of her LaSalle County lawyer.

The last Briefs on Defendants' Motions were filed in the District Court in August, 1984. (R. Item 18) Over a year later, in September, 1985, the Defendants' Motions for Summary Judgement were granted but the Defendants' Motions for attorneys' fees were denied without comment. (Appendix 2)

The Defendants did not appeal from the Order denying their Motion for attorneys' fees nor did they suggest in their Briefs in the Appellate Court that they were entitled to attorneys' fees from either the Plaintiff or her attorney.

Pursuant to Circuit Rule 14(f) of the United States Court of Appeals for the Seventh Circuit, there was no

oral argument and no party filed a statement seeking oral argument.

The Brief filed by the Petitioner in the United States Court of Appeals was essentially identical to the Memorandum she had filed in opposition to the Motion for Summary Judgement. However, in the Brief, her Federal Court lawyer cited an Illinois Supreme Court rule erroneously. In three sentences, he pointed out that: "Nor was Plaintiff's counsel acting in violation of the Lower Court's Order. Plaintiff's counsel had filed for a Stay of that Order and, once the Motion for Stay was filed, all proceedings were stayed pending a decision on the Motion for Stay. (See *Ill. Rev. Stat.*, Ch. 110, Art. 2-1305 (1981)) (Appendix 3, Argument in the United States Court of Appeals, page 18) In a third sentence, on the next page, Plaintiff's counsel stated that: "According to Illinois Supreme Court rules, a Motion for Stay automatically stays judgement until such time as a ruling is made on the Motion for Stay." (Appendix 3, page 19) This was an erroneous statement and was impeccably rebutted by the Defendants in their Briefs.

In the Opinion below, the United States Court of Appeals for the Seventh Circuit affirmed the Trial Court and employing *Fed. R. Civ. P.* 11 upon its own initiative, imposed sanctions in the amount of double costs and reasonable attorneys' fees incurred by the Defendants against the Plaintiff and against her lawyer, each to pay one-half. (Opinion below, Appendix 1, page 7) It appears from the Opinion that her counsel was penalized because of his erroneous citation of Illinois law. "Ordinarily, we impose attorneys' fees on the party, leaving party and lawyer to

settle accounts. But, we do not suppose that the representations about State law were approved by Mrs. Thornton personally; although she is responsible for pursuing this litigation, she has received bad legal advice." (Appendix 1, page 7) It appears from this quote and others that Mrs. Thornton was sanctioned primarily because she pursued the litigation. "This suit is Mrs. Thornton's revenge." She charged the sheriff, three deputy sheriffs, and her former husband with violating her rights under five Amendments to the Constitution.– " (Appendix 1, page 2)

The Petitioner filed a timely Petition for Rehearing *In Banc* which was denied on April 28, 1986.

Mrs. Thornton's attorney paid his sanctions and is not seeking certiorari. Mrs. Thornton is not seeking certiorari on the substantive issue but seeks certiorari only on the issue of sanctions.

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ARGUMENT

THE DECISION OF THE COURT BELOW MERITS REVIEW BECAUSE IT HAS POTENTIAL CHILLING EFFECT UPON THE ASPIRATIONS OF CIVIL RIGHTS COMPLAINANTS BY PERMITTING THE CIRCUIT COURT OF APPEALS TO EMPLOY A DISTRICT COURT RULE TO IMPOSE SANCTIONS UPON A PARTY WITHOUT GIVING THAT PERSON NOTICE AND A RIGHT TO BE HEARD IN A CASE WHERE FEES WERE SOUGHT PURSUANT TO 42 USC 1988 IN THE TRIAL COURT AND DENIED AND WHERE THE RESPONDENTS DID NOT APPEAL THAT DENIAL

The manner in which the Court below reached out to impose sanctions upon Mrs. Thornton is chilling to the aspirations of any potential civil rights complainant. Petitioner's counsel committed a serious error by stating that Illinois law mandated that the filing of a Motion for Stay caused a Stay to be, in effect, given. This argument was not made at the trial level but was made in three sentences in the Argument in the Seventh Circuit. Counsel admitted his error, apologized to the Court and paid the fine. Though the Opinion below is somewhat vague on the issue, it seems clear that the Court below imposed sanctions upon counsel primarily because of his miscitation of Illinois law and sanctions against Mrs. Thornton because of the alleged frivolity of the appeal. ". . . This suit is Mrs. Thornton's revenge." (Appendix 1, page 2); " . . . The Appellate proceedings in this case are unsupported by any colorable legal argument. They must have been pursued to vex Mr. Thornton and the sheriff. We therefore award attorneys' fees to the Appellee on our own initiative." (Appendix 1, page 4); " . . . she is responsible for pursuing this litigation, . . ." (Appendix 1, page 7)

In her Brief in the Seventh Circuit, the Petitioner cited 17 cases and four other references to Illinois statutory law other than the miscitation to support her argument that to employ criminal remedies to evict her from her home violated her constitutional rights. Neither side could cite any case directly on point to support their particular positions that there either was or was not a violation of Mrs. Thornton's rights by the actions of the Defendants. The basic argument of the Petitioner was that Respondent Edmund Thornton was a prominent LaSalle County citizen who was able to employ the services of Defendant Sheriff Wahl and his staff to effectuate criminally what was essentially a civil matter. The Trial Court pointed out that perhaps "—it would have been more appropriate for Thornton to seek a contempt order." (Appendix 2, page 13), (See *Davis v. Davis,* 114 Ill. App. 3d 438, 451 NE 2d 4 (4th Dis., 1983)) However, the Court opined that there was no reason why the criminal laws were not available to someone solely because a contempt citation was also obtainable. (Appendix 2, page 13) Citing *People v. Miller,* 334 Ill. App. 574, 101 NE 2d 874, 877 (3rd Dis., 1971) and *Steele v. State,* 191 Ind. 50, 132 NE 739, 740 (1921) the Petitioner had argued at the Trial Court and in the Seventh Circuit that the criminal trespass statute was not meant to settle what were essentially civil property disputes. (See also, *U.S. v. Miller,* 659 F2d 1029, 1032, 33 (10th Cir., 1981))

The Trial Court found that the actions of the Respondents did not cause a violation of Mrs. Thornton's rights. "An arrest upon criminal complaint after Plaintiffs resistance to leaving may have been heavy handed. It was not a violation of her constitutional rights." (Appendix

2, page 13) It also determined that Mrs. Thornton's lawsuit was not frivolous in denying, without comment, the Respondent's request for attorneys' fees pursuant to 42 USC 1988. The Court of Appeals agreed with the Trial Court that there was no constitutional violation but disagreed with the Trial Court on the issue of whether the suit was frivolous.

Petitioner would contend that the lawsuit was not frivolous and that sanctions should not have been imposed against her. However, this contention is not reason for this Court to grant certiorari. The cause for certiorari is the manner in which the Appellate Court overreached the boundaries of the law in order to impose sanctions upon Mrs. Thornton and the extremely chilling effect that has upon other Plaintiffs and lawyers in potential civil rights litigation.

The Opinion below asserts that the phrase in Rule 11, "other papers" is "—a term that includes Notices of Appeal and Appellate Briefs—" The Decision then assumes (a) that if, after filing a Notice of Appeal in the District Court, a Court of Appeals declares the proceedings before it to be unsupported by any colorable argument, it may invoke Rule 11 sanctions, and (b) Rule 11 sanctions may be imposed by Courts of Appeals for Rule 11 violations in appellate briefs. This extension of Rule 11 sanction power to United States Courts of Appeals is clearly without foundation.

Rule 1 of the *Fed. R. Civ. P.* states: "These rules govern the procedure in the *United States district* courts in all suits of a civil nature.—" (emphasis added) Indeed, the Seventh Circuit held in an earlier case that the

Federal Rules of Civil Procedure "have no application to the Circuit Court of Appeals." *Stewart Die Casting Corp. v. N.L.R.B.,* 129 F2d 41, 44 (7th Cir., 1942); See also, *Hines v. Royal Indemnity Co.,* 253 F2d 111, 113 (6th Cir., 1958). A reading of the Rules of Civil Procedure is not a choice between a liberal and a technical interpretation of the Rule but the choice is instead "—between recognizing or ignoring what the Rule provides in plain language. We accept the Rule as meaning what it says." (*Schiavone, et al. v. Fortune, et al.,* 54 U.S.L.W. 4692, 4694 (June 18, 1986)) The plain language in Rule 1 of the *Fed. R. Civ. P.* states that the rules are for use in the District Courts.

By employing Rule 11, the Court below avoided the proper manner of reviewing the refusal of the Trial Court to issue attorneys' fees. (*Anderson v. Bessemer City,* 470 US —, 84 L. Ed. 2d 518, 528, 105 S. Ct. 1504 (1985)*

Of course, the Court below could not employ the *Bessemer* standards inasmuch as the Respondents themselves did not believe they could meet that standard and did not appeal the Trial Court's order.

Yet another reason to grant certiorari in the present case is to clarify under what circumstances the Courts of Appeals may impose sanctions upon parties. In this case, the Court imposed sanctions against Mrs. Thornton (and her counsel) without notice to them that they were considering imposing sanctions and without giving them the

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*While the Respondents may argue that the three sentences misciting Illinois law did not appear in the Trial Court, it is clear that the Appellate Court sanctioned Mrs. Thornton for seeking revenge against her husband and not because her lawyer misciting Illinois law. Her lawyer was sanctioned for that.

right to be heard. While it may be argued that the Brief itself was the right to be heard on the issue of the frivolity of the appeal, neither Mrs. Thornton nor her lawyer at any time knew that the Court was considering imposing sanctions until after sanctions were imposed. Therefore, Mrs. Thornton did not have the opportunity to confront the Court and argue through case law and orally that sanctions should not be imposed against her.

By imposing sanctions against both her and her lawyer, the Seventh Circuit set up a potential conflictual situation in which Mrs. Thornton, had she known in advance, may have chosen to retain different counsel to argue that if fees were imposed, they should be imposed solely against her lawyer and not against herself. She never had that opportunity simply because she never knew sanctions were being considered by the Court. "Like other sanctions, attorneys' fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record. But, in a proper case, such sanctions are within a Court's powers." (*Roadway Express, Inc. v. Piper*, 447 US 752, 766 (1980))

The effect upon vigorous advocacy is highlighted by what happened in this case. Counsel for Mrs. Thornton can avoid future personal sanctions for his stupid misinterpretation of Illinois law by being more careful to detail. However, when confronted with a situation where the law is not settled, he can file suit only at great risk and even where the Court below denies attorneys' fees, or assumedly where the parties below never sought attorneys' fees, he must be concerned in appealing the case lest the Court of

Appeals decides that the matter is frivolous and imposes sanctions against his clients without any notice or hearing rights.

On a personal note, counsel has appeared both here and in the United States Court of the Seventh Circuit for successful petitioners in matters involving unsettled principles of law. (*Stanley v. Illinois,* 405 US 645 (1972); *Wheeler v. Glass,* 473 F2d 983 (7th Cir., 1973); *Lojuk v. Quandt,* 706 F2d 1456 (7th Cir., 1983); See also, *Lojuk v. Johnson,* 770 F2d 619 (7th Cir., 1985) and to a lesser degree, *Joseph v. Brierton,* 739 F2d 1244 (7th Cir., 1984) and; *Malcak v. Westchester Park District,* 754 F2d 234 (7th Cir., 1985)) Had a decision similar to this been in effect when he litigated any of these cases, he, like other conscientious counsel, would have thought twice about litigating the rights of unwed fathers, boys tied to their beds for unconscionable periods of time in mental health hospitals or veterans receiving shock treatments without their consent in VA hospitals. The standard for awarding attorneys' fees to defendants in civil rights cases is adequately set forth in *Christiansburg Garment Co. v. Equal Employment Opportunity Commission,* 434 US 412 (1978) and *Hughes v. Rowe,* 449 US 5 (1980). The Opinion by the Court below goes far beyond the standards set by these decisions in that it permits sanctions by the Courts of Appeals on its own initiative without a hearing, a right to be heard, and review even where the defendants do not request such sanctions.

For the reasons above stated, the Petitioner contends that the Opinion merits review so that this Court may clarify when, under what circumstances and with what

standards sanctions may be imposed against non-prevailing plaintiffs in civil rights litigation.

Respectfully submitted,

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APPENDIX 1

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 85-2786

ELIZABETH THORNTON,

Plaintiff-Appellant,

v.

ROBERT WAHL, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 84 C 3089—**James B. Moran**, *Judge.*

SUBMITTED MARCH 25, 1986—DECIDED APRIL 3, 1986

Before CUMMINGS, *Chief Judge,* and POSNER and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Elizabeth Thornton expelled her husband in 1975 from Thornwood, the family home, and he took up residence in one of the estate's coachhouses. In 1978 the state court with jurisdiction of the Thorntons' divorce proceedings ruled that Thornwood is Mr. Thornton's property. After the two were divorced,

Mrs. Thornton refused to leave Thornwood. On November 10, 1983, the state court entered a supplemental judgment requiring Mrs. Thornton to depart no later than December 1. She filed an appeal (on November 29) and an application for a stay; although the court did not issue a stay by December 1, Mrs. Thornton did not leave.

Mr. Thornton asked Robert Wahl, the sheriff of La Salle County (where Thornwood is located) to help him regain the main house of the estate. On December 7 Mr. Thornton, Wahl, and three deputy sheriffs arrived at Thornwood. Mrs. Thornwood refused to let them in. While the sheriff awaited the arrival of a locksmith, Mrs. Thornton called her attorney, who (according to the complaint) told her that she was entitled to stay. After the locksmith opened the front door, Mrs. Thornton locked herself in her bedroom. When she emerged, she refused to leave the house without a box of personal possessions, a box too large to fit in her car. It looked like her departure would be indefinitely postponed. The sheriff then arrested her for criminal trespass, in violation of Ill. Rev. Stat. ch. 38 § 21-3 (a). This statute provides that anyone who "remains upon the land of another after receiving [oral or written] notice from the owner or occupant to depart, commits a class C misdemeanor." Mrs. Thornton was jailed for 2½ hours and released on bond. The State's Attorney later dropped the criminal charge against her. On December 9 the court finally denied Mrs. Thornton's motion for a stay, so Mr. Thornton retained possession of Thornwood.

This suit is Mrs. Thornton's revenge. She charged the sheriff, three deputy sheriffs, and her former husband with violating her rights under five amendments to the constitu-

tion. She also invoked the court's pendent jurisdiction and charged the defendants with five torts. Her theory is that Mr. Thornton should have filed still another state action—for ejectment, forcible entry and detainer, or contempt of court—to procure her departure from the house. The district court granted summary judgment for the defendants, concluding that although forcible entry and detainer rather than criminal trespass is the right way to settle disputes between tenants and landlords, Mrs. Thornton had had her day (rather her eight years) in court, and Mr. Thornton was entitled to enforce the judicial order that Mrs. Thornton leave. Because Mr. Thornton had one judicial order, he did not need another. Mrs. Thornton cited to the district court (and to us) several state cases saying that trespass is the wrong way to try disputed claims of right to interests in land. The district court properly replied that Mr. Thornton had tried his claim to judgment and was not using the criminal law to settle the dispute. He was using it only to enforce the court's order. He was entitled to enter the house; once there, he as owner was entitled to instruct Mrs. Thornton to leave; when she refused to leave except on conditions satisfactory to herself, the sheriff was entitled to take her away.

Mrs. Thornton replies that Mr. Thornton was not authorized to enter or tell her to leave. This is so, her brief says, because "[a]ccording to Illinois Supreme Court rules, a Motion for Stay automatically stays judgement [sic] until such time as a ruling is made on the Motion for Stay." A motion for a stay was pending on the morning of December 7 when the sheriff arrived, and Mrs. Thornton therefore concludes that her ex-husband had to bide his time. Her brief does not cite any rule for this proposition.

but it cites Ill. Rev. Stat. ch. 110 § 2-1305 for the statement that "once a Motion for Stay was filed, all proceedings were stayed pending a decision on the Motion for Stay."

We publish this opinion to remind counsel that they may not make assertions of law for which there is no support. Fed. R. Civ. P. 11 provides that every pleading or "other paper"—a term that includes notices of appeal and appellate briefs—shall be signed, and that the signature "constitutes a certificate . . . that the [person signing] has read the . . . paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." If a paper violates this rule, "the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include" attorneys' fees. The appellate proceedings in this case are unsupported by any colorable legal argument. They must have been pursued to vex Mr. Thornton and the sheriff. We therefore award attorneys' fees to the appellees on our own initiative.

The argument that a motion for a stay automatically stays a judgment pending the appellate court's decision is preposterous. It would deprive courts of the power to set enforceable deadlines. Mrs. Thornton cites Ill. Rev. Stat. ch. 110 § 2-1305 and "Illinois Supreme Court rules." Section 2-1305 authorizes the filing of a motion to stay

"proceedings" in court pending resolution of other issues. It does not deal with stays of outstanding orders, let alone say that an application for a stay has the same effect as the issuance of a stay.* It allows a judge to issue a "certificate" staying "further proceedings," and this certificate acts as a stay, but this is a far cry from an automatic stay. Mrs. Thornton does not cite any rule of the Supreme Court of Illinois, and we cannot find one with the effect she describes. Rule 305(b)(1), the only one close to the point, states that a reviewing court "may stay pending appeal . . . the enforcement, force and effect of any . . . final or interlocutory judgment or judicial or administrative order." The Rule does not hint that the filing of a motion has the same effect as the issuance of a stay. Mrs. Thornton does not cite any case construing § 2-1305 or Rule 305 in this way; we have not found one.

In sum, this appeal rests on a serious misstatement of state law. It is hard to imagine that a lawyer could advise a client to defy an outstanding judgment on the ground that an application for a stay had been filed but had not been granted, or that a lawyer could inform us—without a shred of authority—that in Illinois an application for a stay has the effect of a stay itself. We do not want to discourage vigorous advocacy, but an advocate must represent his client within the existing structure of the law, and

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* The pertinent text is: "A party intending to move to set aside any judgment, bond or other proceeding may apply to the court or to the judge in chamber for a certificate (which the judge may, in his or her discretion, grant) that there is probable cause for staying further proceedings until the order of the court on the motion. Service of a copy of the certificate at the time of or after the service of the notice of the motion stays all further proceedings accordingly."

not some imagined version of it. See *In re TCI Ltd.*, 769 F.2d 441 (7th Cir. 1985). Mrs. Thornton's presentation also cannot be described as a reasoned request for a change in the law. Her brief misrepresents existing law; she does not accurately describe the law and then call for change. (It would not matter if she had. A federal court hearing an action under 42 U.S.C. § 1983 is not the right forum in which to request a change in the appellate procedures of Illinois, if the existing procedures comply with the constitution.)

Rule 11 requires counsel to study the law before representing its contents to a federal court. An empty head but a pure heart is no defense. The Rule requires counsel to read and consider before litigating. Counsel who puts the burden of study and illumination on the defendants or the court must expect to pay attorneys' fees under the Rule. See *TCI, supra*, 769 F.2d at 445-46, 449-50; *American Security Vanlines, Inc. v. Gallagher*, 782 F.2d 1056 (D.C. Cir. 1986); *Zaldivar v. City of Los Angeles*, 780 F.2d 823 (9th Cir. 1986); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168 (D.C. Cir. 1985); *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 253-54 & n.7 (2d Cir. 1985). We do not say that Mrs. Thornton and her lawyers acted with the subjective purpose to misstate the law and harass the defendants. The test under Rule 11 is objective. See *Frazier v. Cast*, 771 F.2d 259, 265 n.4 (7th Cir. 1985); *Zaldivar, supra*, 780 F.2d at 831; cf. *TCI, supra*, 769 F.2d at 445. The point, rather, is that every lawyer must do the necessary work to find the law *before* filing the brief. It is not acceptable to make an assertion of law and hope that it will turn out to be true.

This assertion turned out not to be true, turned out indeed to be wildly untrue. Ordinarily we impose attorneys' fees on the party, leaving party and lawyer to settle accounts. But we do not suppose that the representations about state law were approved by Mrs. Thornton personally; although she is responsible for pursuing this litigation, she has received bad legal advice. We therefore impose part of the award on counsel personally. Mrs. Thornton and her counsel must pay double costs and the reasonable attorneys' fees incurred by the defendants. Counsel must pay half of the bill personally, and Mrs. Thornton must pay the other half. Counsel for appellees have 15 days to file appropriate statements with the clerk.

AFFIRMED

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX 2

Memorandum and Opinion of Trial Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ELIZABETH THORNTON,

Plaintiff,

vs. No. 84 C 3089

ROBERT WAHL, Sheriff, LaSalle County, ROBERT NEWELL, Deputy Sheriff, LaSalle County Sheriff's Office, ANTHONY M. CONDI, Deputy Sheriff, LaSalle County Sheriff's Office, ROBERT SCUTT, LaSalle County Sheriff's Office and EDMUND THORNTON,

Defendants.

MEMORANDUM AND ORDER

This civil rights action is an installment in a contentious divorce proceeding. It is an installment which here concludes, as defendants' motion for summary judgment is hereby granted.

I.

On November 10, 1983 the Circuit Court of Cook County entered a supplemental judgment of dissolution of marriage in connection with post-divorce property distribution proceedings between plaintiff and defendant Thornton. As part of the judgment order plaintiff was ordered

to vacate the family home (Thornwood) by December 1, 1983. The relevant part of the order reads as follows:

> It is further ordered that Mrs. Thornton vacate the Thornwood property and remove the listed furnishings at her cost on or before December 1, 1983. This will allow her sufficient time to prepare for the move from the house. The court must keep in mind that Thornwood was originally found to be [Mr. Thornton's] non-marital property on July 5, 1978. This finding was affirmed by the Appellate Court on November 20, 1980. [Mrs. Thornton] has lived there rent-free for this entire period and [Mr. Thornton] has been excluded from the main residence at Thornwood since sometime in 1975. I believe Mrs. Thornton has had enough time to find other living quarters. She has ample funds available to her to rent or buy a new house and she receives maintenance payments to help her pay the cost of living there. She can always store her furniture on December 1, 1983 if she has not found a permanent residence by then. In the event [Mrs. Thornton] has not vacated Thornwood and removed her listed furnishings by December 1, 1983, [Mr. Thornton] may ship the listed items to a storage facility in Ottawa, Illinois, and he may deduct the costs incurred from future payments of unallocated maintenance and child support. He may also move into the main house on December 2, 1983.

Plaintiff filed a notice of appeal with the state appellate court on November 29, 1983. On November 30, 1983 she filed an application for a stay of the November 10, 1983 order, also in state appellate court. Thornton filed a response on December 1, 1983.

Thornton's attorney sent a letter to defendant Wahl, the Sheriff of LaSalle County, on December 1, 1983. In the letter he advised Wahl of the Circuit Court's November

10, 1983 judgment and the existence of pending motions in the appellate court. The letter enlisted the aid of Wahl and his department in the event that plaintiff failed peaceably to comply with the Circuit Court's judgment. The letter stated that Thornton was entitled to enforce the supplemental decree by virtue of the final statement in the Circuit Court's opinion that "[t]here is no just reason to delay enforcement or appeal of this judgment." Thornton and his lawyer also met with Wahl on December 1, 1983. Thornton advised the sheriff that he would seek to oust plaintiff from Thornwood, if necessary, on December 7, 1983.

The appellate court had taken no action on plaintiff's motions by 8:15 a.m. on the morning of December 7, 1983, when Thornton and the three deputy sheriff defendants appeared at Thornwood. Plaintiff refused to admit Thornton and the deputies. After two fruitless hours a locksmith picked the lock of the door. Upon gaining entrance Thornton demanded that plaintiff leave, which she refused to do. Plaintiff then called her attorney, who in turn contacted Wahl and unsuccessfully argued that the eviction of plaintiff was improper and should be halted.

After Thornton had been in the house 15 minutes and after plaintiff had locked herself into her bedroom briefly, plaintiff agreed to vacate Thornwood on the condition on the condition that she be able to take a large box of personal papers or belongings. At this point she was arrested for criminal trespass, Ill.Rev.Stat. ch. 38, § 21-3,[1] hand-

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[1]Ill. Rev. Stat. ch. 38, § 21-3 reads in relevant part:
Criminal Tress to land.

(Continued on following page)

cuffed, and jailed for two and-a-half hours before being released on bond. Presumably because of the local prominence of the parties plaintiff's arrest attracted some media attention. The criminal trespass charge was later dropped.

II.

Plaintiff's complaint alleges in essence that she was unlawfully seized and detained, in violation of the Fourth and Fourteenth Amendments. Her position is that the sheriff and his deputies wrongfully intervened to assist Thornton in carrying out an eviction he was not legally entitled to perform. There is no question that the arrest and detention of a citizen without lawful authority represents a substantive constitutional deprivation. There is also no question that defendants' acts were performed under color of state law. Defendants' position is that the deputies had probable cause to arrest plaintiff for criminal trespass. She, after all, refused to leave Thornwood one week after the date she was ordered to do so by the Circuit Court. The existence of probable cause for the arrest, defendants argue, shields them from section 1983 liability.

Summary judgment is to be granted when there are no disputes of material fact and the moving party is entitled to judgment as a matter of law. Even when all in-

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(Continued from previous page)

a) Whoever enters upon the land or any part thereof of another, after receiving, immediately prior to such entry, notice from the owner or occupant that such entry is forbidden, or remains upon the land of another after receiving notice from the owner or occupant to depart, commits a Class C misdemeanor.

ferences are drawn in plaintiff's favor, as they must, summary disposition in this case is warranted.

Plaintiff's case rests upon two propositions. The first is that Thornton enlisted the aid of the sheriff and his deputies. In other words, the deputies arrested plaintiff in order to effectuate Thornton's eviction of plaintiff from Thornwood. There is much evidence to support this proposition and the defendants appear to concede its truth. The second and failing proposition is that Thornton and the other defendants lacked authority to arrest plaintiff, thereby removing her from the premises.

At the time of the arrest Thornton had a court order declaring him the owner, granting him possession and directing plaintiff to leave by a prior date. It had not been reversed, vacated nor stayed. Plaintiff had a claim of right, but it had been adjudicated adversely to her.

Plaintiff does not deny that she was supposed to leave, that she first refused to do so and that her subsequent acquiescence was substantially qualified. She complains, rather, that her former husband used the wrong remedy. She claims that he should have proceeded by a forcible entry and detainer action or by a contempt proceeding and that she was unconstitutionally deprived of her rights by his initiating a criminal proceeding.

Forcible entry and detainer, was, however, apparently not available because the trial court in a divorce proceeding retains jurisdiction to enforce its decree. See *Davis v. Davis,* 114 Ill.App.3d 438, 71 Ill.Dec. 516, 451 N.E.2d 4 (4th Dist. 1983). Nor has plaintiff indicated why the protection of the criminal laws is not available to someone

solely because a contempt citation is obtainable. If Thornton had broken into the house prior to December 1 or, contrary to a court order not to contact plaintiff personally, had confronted her at the residence prior to that date, this court has no doubt that plaintiff would have, quite properly, called the police. Perhaps it would have been more appropriate for Thornton to seek a contempt order. In the absence of some further judicial action which relieved plaintiff from the obligation of the court order, however, by December 7, 1983, defendants had every reason to believe that plaintiff was remaining upon the land of another after receiving both notice from the owner to depart and a binding court order, entered after full adversarial proceedings, to that same effect. An arrest upon criminal complaint after plaintiff's resistance to leaving may have been heavy handed. It was not a violation of her constitutional rights.

For the reasons stated, the defendants' motion for summary judgment is granted. Their request for attorneys' fees is denied.

/s/ James B. Moran
JAMES B. MORAN
Judge, United States District Court

September 19, 1985.

APPENDIX 3

Argument in Brief of Petitioner in U.S. Court of Appeals for Seventh Circuit

IV. ARGUMENT

The Plaintiff's Rights to Privacy and to be Free From Bodily Restraint and Punishment Were violated by the Actions of Defendants Who, Without Seeking a Rule to Show Cause in the Trial Court or an Eviction Order in the LaSalle County Courts and While a Motion to Stay Was Pending, Evicted and Arrested the Plaintiff

A. STATE ACTION

The facts in this case thus show:

1. Acting on the advice of her counsel, the Plaintiff was in violation of the Order of the Circuit Court of Cook County which mandated that she leave her house before 1 December.

2. Through her attorneys, the Plaintiff had filed a Motion to Stay the Order of the Trial Court. That Motion for Stay was pending in the Illinois Appellate Court, First District.

3. Defendant and his lawyers met with the Defendant sheriff to get assistance in evicting the Plaintiff.

4. Neither the Defendant, his attorneys or Defendant Sheriff Wahl notified the Plaintiff or her attorneys prior to proceeding to the home on the 7th of December.

5. The sheriff's deputies, Defendants Newell, Condi and Scutt state that they received orders to assist in evicting Mrs. Thornton.

6. Defendant Thornton did not follow the Illinois Forcible Entry and Detainer Statute (*Ill. Rev. Stat.*, Ch. 110, para. 9-110 (1981))

7. Defendant Thornton, through his attorneys, did not file a contempt citation in the Cook County Circuit Court. (*Davis v. Davis,* 114 Ill. App. 3d 438, 451 N.E. 2d 4 (4th Dist., 1983); *Strack v. Donahue,* 535 F Supp. 772 (N.D. Ill. 1981); *Estate of George v. Lescher,* 99 Ill. App. 3d 388; 426 N.E. 2d 6 (4th Dist., 1981); *In Re Marriage of Walden,* 93 Ill. App. 3d 699 (1st Dist., 1981))

8. Defendants knew that a Motion for Stay had been filed but not ruled upon.

9. After agreeing to leave if she could take her personal papers, the Plaintiff was arrested for criminal trespass and the charges were ultimately dismissed.

The threshhold question is what status did Plaintiff, Elizabeth Thornton, have on December 7, 1983. The Trial Court indicates that (App. 1, pg. 6) after the 1st of December, she was a trespasser, despite the fact that she had resided in the home with her husband and raised her four children there during the previous sixteen years. If the Trial Court's analysis is correct, then the actions of the Defendants were concededly reasonable, albeit, as the Trial Court states, "heavy handed." (See App. 1, pg. 6)

The criminal trespass statute was meant to protect the property owner from the uninvited guest or the business invitee who refuses to leave. *People v. Spencer,* 268 N.E. 2d 192, 194, 195 (1st Dist., 1971). The criminal trespass statute "—was not intended to be used as an aid to gain possession of real estate or in arresting an occu-

pant thereof who gained such occupancy lawfully and who thereafter held over his lawful term without right." *Steele v. State,* 191 Ind. 50; 132 N.E. 739, 740 (1921). A reading of the criminal trespass statute makes it clear that this statute was not meant to settle civil property disputes. *Ill. Rev. Stat.,* Ch. 21-3(c) states:

> "This section does not apply—to anyone living on such land at the request of, or by occupancy, leasing or other such agreement or arrangement with the owner or his agent."

Even a simple tenant at sufferance cannot be arrested but must be evicted. It is "— an abuse of the penal statute relating to criminal trespass to use it to try disputed rights in real property." *People v. Miller,* 334 Ill. App. 574, 101 N.E. 2d 874, 877 (3rd Dist., 1951) See also, *C.J.S. TRESPASS,* Pg. 102.

Based on the facts of this case, the Plaintiff would seem to have rights similar to those of a tenant at sufferance. (And no doubt much more.) Such a tenant cannot be evicted without adherence to the due process legal steps mandated in the Illinois forcible detainer statute. See *Bradley v. Gallagher,* 14 Ill. App. 3d 652; 303 N.E. 2d 251, 253 (1st Dist., 1973); *Perry v. Evanston YMCA,* 92 Ill. App. 3d 820; 460 N.E. 2d 340 (1st Dist., 1981). The Trial Court itself recognized that Illinois courts hold that a contempt citation is the proper way to have one in Plaintiff's position removed. *Davis v. Davis, Supra; Strack v. Donahue, Supra.* However, the Court then opines that nevertheless the Plaintiff was a trespasser and hence could be arrested. (App. 1, pg. 6) If that were the case, no one would employ citation proceedings. It would be

far easier and cheaper to dial 911 and show the police a copy of a civil order and insist they do their duty. The simple fact is the Illinois courts recognize that one in Plaintiff's position may be in violation of a Court order but they do not pretend that a spouse of 18 years is turned into a criminal trespasser in three weeks.

Since the Petitioner was not a trespasser, she could not be arrested. The sheriff of the County who, after all, is responsible for enforcing forcible detainer statutes, would be the first to know that. Nevertheless, Defendants accompanied Defendant Thornton in his eviction efforts and subsequently arrested the Plaintiff without ever conferring with the State's Attorney of the County to determine the legality of what they were doing or to determine if a warrant was, in fact, necessary or without seeking to obtain a warrant from a neutral magistrate. See *McDonald v. US,* 335 US 451, 459, 460 (1948); *Payton v. New York,* 445 US 573 (1980); *People v. Abbey,* 81 Ill. 2d 159, 407 N.E. 2d 543, 547 (1980).

In order that the dictates of due process be followed, Defendant Thornton should have filed a citation proceeding in the Circuit Court of Cook County seeking a Rule to Show Cause against the Plaintiff. Assuming that were obtained, pursuant to provisions in *Ill. Rev. Stat.,* Ch. 110, Art. 12-105, Defendant Thornton would have filed that judgment with the Circuit Court of LaSalle County pursuant to which Defendant Wahl could have acted to eject the Plaintiff. Apparently recognizing this and having filed a Stay, Plaintiff's lawyer advised the Plaintff that she did not have to move from her home. Plaintiff's counsel also informed Defendant Wahl that no ruling had occurred on his Motion and that no citation had been filed.

(App. 6) Nor was Plaintiff's counsel acting in violation of the lower court's order. Plaintiff's counsel had filed for a Stay of that order and, once the Motion for Stay was filed, all proceedings were stayed pending a decision on the Motion for Stay. See *Ill. Rev. Stat.*, Ch. 110, Art. 2-1305 (1981).

It is telling that Defendant Sheriff Wahl evicted and arrested the Plaintiff though no Rule to Show Cause had been filed while a Motion for Stay was in effect but, when, later that day, the Trial Court in fact did enter a Stay order, the sheriff refused to evict and/or arrest Defendant Thornton. The reason why this did not occur is that as pointed out in the Complaint, Defendant Thornton is one of the wealthiest and most powerful men in LaSalle County.

B. *FEDERAL JURISDICTION*

Probable cause is a condition precedent to any significant pre-trial restriction of liberty. *Baker v. McCullum,* 443 US 137, 142 (1979) The Defendant argued successfully below that the Plaintiff was a trespasser since less than a month previously the Circuit Court of Cook County ruled that the home that she and her children had lived in for the prior 18 years was her former husband's property. This argument begs the question. If a tenant at sufferance may not be evicted without a court hearing and other due process guarantees, it is inconceivable that the Plaintiff, who lived in her home for many years as a wife and mother, could be evicted and arrested three weeks after the title to the property had been ruled upon without anything further. The Court below admitted that the proper procedure would have been for Defendant Thorn-

ton to have filed a Rule to Show Cause in the Trial Court. (App. 1, pg. 6)

According to Illinois Supreme Court rules, a Motion for Stay automatically stays judgement until such time as a ruling is made on the Motion for Stay. None of this was accomplished. Acting upon the advice of her lawyer, Plaintiff stayed in her home believing that she was secure until such time as the legal machinery had been exhausted. Though the crime alleged was, particularly under the circumstances, the most minor of misdemeanors, an arrest was made without Defendant seeking a warrant from a neutral magistrate and when there were clearly no exigent circumstances which existed. *Payton v. New York, Supra.* As Mr. Justice Jackson pointed out in *McDonald v. US, Supra,* at pp. 459, 460, "—when an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real, immediate and serious consequences if he postponed action to get a warrant." Ironically, the Plaintiff was not arrested until such time as she agreed to leave her home but with her personal papers. In *Baker,* the majority opinions pointed out that there was nothing in the sheriff's conduct which was outrageous. He had been sheriff for only 40 days and arrested the defendant on a valid warrant—though the defendant was the wrong person, he was the person named in the warrant itself. In a concurring opinion, Mr. Justice Blackmun cited Mr. Justice Harlan's opinion in *Poe v. Ullman,* 367 US 497, 543 (1961) favorably. " 'This liberty is not a series of isolated points pricked out in terms of (the Bill of Rights). It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and pur-

poseless restraints.' " *Baker v. McCullom, Supra,* at pg. 147.

The Appellant would submit that the actions of the Defendant in evicting and arresting her while knowing a Motion to Stay was pending and that no citation proceedings had been initiated in the Cook County Court was "a purposeless restrain" as well as an arbitrary action on the part of the Defendants. Certainly, the Defendant Sheriff and his deputies knew the law. They were reminded of it when Mrs. Thornton's attorney called her during the siege of her residence. Nevertheless, they acted on the request of the Defendant without seeking to obtain the advice of the State's Attorney of the County, a warrant from a neutral magistrate or, as common sense would seem to dictate, phoning the Plaintiff's lawyer in advance—or the Plaintiff herself—and suggesting that they would evict her if she did not remove herself by a date certain. This would have given the Plaintiff time to move out of the home if she desired and/or Plaintiff's counsel an opportunity to go to the Trial Court or the Appellate Court to seek the appropriate restraining orders. Instead, the Plaintiff's marital home was laid seige. She was arrested after agreeing to leave, was handcuffed, jailed, printed, mugged, and compelled to face trial—though the charges were ultimately dismissed by the State's Attorneys' Office.

The liberty which the due process clause protects includes the rights " 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.' (Citing *Meyer v. Nebraska,* 262 US 390, 399 (1923) and *Dent v. West Virginia,* 129 US 114, 123-124 (1889)) Among the historic

liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security." *Ingraham v. Wright*, 430 US 651, 673 (1977).

V. CONCLUSION

For the reasons above stated, the Plaintiff-Appellant respectfully asks that this Court hold that, based upon the facts before it on the Motion for Summary Judgment, that the Plaintiff's rights as protected by the Fourth, Fifth and Fourteenth Amendments of the United States Constitution have been violated by the acts of the Defendants and remand the case for further proceedings.

Respectfully submitted,

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APPENDIX 4

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
April 28, 1986

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

ELIZABETH THORNTON,
Plaintiff-Appellant,

No. 85-2786

vs.

ROBERT WAHL, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 84 C 3089
James B. Moran, *Judge*

ORDER

Plaintiff-appellant filed a petition for rehearing and suggestion of rehearing en banc on April 16, 1986. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.